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In The Supreme Court Of The United States

OCTOBER TERM, 1995

WILLIAM C. BLACK, JR., Ph.D.,

Petitioner,

v.

UNITED STATES OF AMERICA, et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

No. 95- 803

WILLIAM C. BLACK, JR., Ph.D.,

Petitioner,

v.

UNITED STATES OF AMERICA, et. al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

Petitioner Dr. William C. Black, Jr. respectfully presents this brief in reply to the opposition brief of the

Government in this matter, pursuant to Rule 15 of the Rules of this Court as follows:

ARGUMENT

The government's brief in opposition to the petition for certiorari is unable to cite a case of this Court in which the "state secrets" privilege defeated a constitutionally based claim. Such a result raises the very serious issue of whether the federal government has power under the Constitution to cite national security as authority to deny individual rights guaranteed by the Constitution. In our system of defined and limited government powers such a result should not occur.

The government's reliance on Snepp v. United States is misplaced as that

case was decided not on constitutional grounds implicating Fourth Amendment protections, but on a contract theory based on facts involving an explicit written confidentiality agreement signed by a CIA employee. Snepp, 444 U.S. 507 (1980). The current case by contrast seeks to remedy a violation of the Fourth Amendment rights of the Petitioner to be free from aggressively invasive acts by government agents.

The circuit court decisions cited by the United States do not persuasively discuss the constitutional implications of a claim of government privilege defeating an individual's right under the Fourth Amendment. That issue was not presented in the Reynolds case before this Court which is the authority for the

lower court opinions, and by contrast in Reynolds this Court allowed the Plaintiff's case to go forward. United States v. Reynolds, 345 U.S. 1 (1953).

The government's reliance on Weinberger v. Catholic Action of Hawaii is similarly misplaced, as that case involved a controversy over an environmental impact statement which would be available to the public under the Freedom of Information Act. Weinberger, 454 U.S. 139 (1981). The Court pointed to Exemption 1 of the Freedom of Information Act as authorizing the withholding of national defense or foreign policy information. 5 USC Section 552(b)(1). The quotation cited in the government's brief at page 17 from the Weinberger case is merely a

paraphrase of part of the 1876 Totten decision, and the Reynolds decision, both previously discussed, and on the facts of the case does not create authority for the result in the lower courts.

The government has not addressed in its opposition the holding in the "Pentagon Papers" case in which this Court considered the history of the Bill of Rights and held that the first ten amendments to the Constitution, adopted after the main body of the Constitution, were intended to be limitations on the general powers of government.

"The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution." New York

Times Company v. United States, 403 U.S. 713, 716 (1971). The holding in that case was that the general powers of the federal government, even in the national security area, could not defeat the provisions of the Bill of Rights. Petitioner's case presents the same issue, as his constitutional claim has been defeated by an assertion of the government's power to claim state secrecy, and the legal conclusion is the same- the United States cannot bar his case from the courts.

This case is not one of a mere evidentiary privilege analogous to the husband-wife or physician-patient privileges. The distinction is that it is the government of the United States that invokes a privilege in this case.

The United States stands as a party empowered and restricted in those powers by the Constitution. Use of the evidentiary privilege by the United States must be constrained by those limitations on the federal government in the Constitution. In addition, to the extent that public policy considerations affect the result, the Fourth Amendment states the controlling public policy of protecting the individual from invasive government actions.

Petitioner objects to any ex parte presentation of classified information to this Court as suggested in footnote 4 of the government brief. Such a procedure denies Petitioner his right to adjudication in an adversarial setting in which he can test the claims made ex

parte. This Court has emphasized the need to develop all relevant facts in the adversarial system as fundamental and comprehensive in our system. See United States v. Nixon, 418 U.S. 683,709 (1974). The type of ex parte presentation suggested by the government denies Petitioner his right to due process in having an adversarial adjudication of his claims in our courts. Without the ability to test the government's assertions, facts will not be developed nor will assertions be challenged with the benefit of the knowledge and preparation of Petitioner and his counsel.

In our constitutional system of defined and limited powers of government it would be a grave mistake to give

unlimited power to any part of the government. Preventing Petitioner from pursuing his claim of constitutional violation to conclusion denies him the very protections set out for him in the Bill of Rights, and thus overturns the very basis for the relationship between citizen and government in our constitutional republic.

CONCLUSION

For the foregoing reasons this case presents an important unresolved constitutional issue of great contemporary importance. A writ of certiorari should issue to review the judgement of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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March 28, 1996